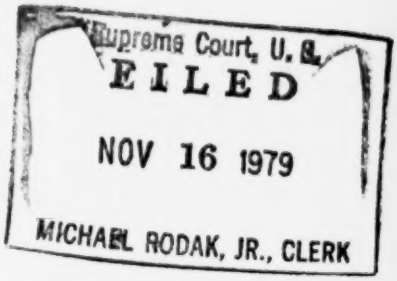
IN THE SUPREME COURT OF THE UNITED STATES

October term, 1979



No. 79-626

NEWTON H. ANCARROW and
JOSEPHINE ANCARROW,

Petitioners,

v.

CITY OF RICHMOND,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
STATEMENT OF THE CASE	
Preliminary Statement	2
Statement of Facts.	4
ARGUMENT	
I. The decision below is not in conflict with applicable Virginia law	6
II. There is no conflict between the decision of the Court of Appeals and the decisions of this Court	15
CONCLUSION.	17
CERTIFICATE	17

TABLE OF CITATIONS

	Page
Cases	
Ancarrow v. City of Richmond, 600 F.2d 443 (4th Cir. 1979). .	4,12, 14,16
Commonwealth v. City of Newport News, 158 Va. 521, 164 S.E. 689 (1932).	14
Cuyohoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 389, 64 L.Ed. 626 (1920)	16
Darling v. City of Newport News, 123 Va. 14, 96 S.E. 307 (1918).	10,14
DuPont Rayon Co. v. Richmond Industries, 85 F.2d 981 (4th Cir. 1936).	13,14
Garrett v. Ancarrow Marine, Inc., 211 Va. 775, 180 S.E. 2d 668 (1971)	4
Fox River Paper Co. v. Railroad Commission of Wisconsin, 274 U.S. 651, 71 L.Ed. 1279 (1927).	13
Kaukauna Water Power Co. v. Green Bay and Miss. Canal Co., 142 U.S. 254, 35 L.Ed. 1004 (1891)	13
Reichelderfer v. Quinn, 287 U.S. 315, 77 L.Ed. 331 (1932). . . .	16

	Page
Constitution of the United States	
Fifth Amendment	6
Fourteenth Amendment.	6,9
Constitution of Virginia	
Article I, Section II	6
Statutes	
28 U.S.C. §1292	3
42 U.S.C. §1983	2,6 7,8
Virginia Code §62.1-44.2, et seq. [1973 Repl. Vol.] . . .	14

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STATEMENT OF THE CASE

Preliminary Statement

This action was filed in the United States District Court for the Eastern District of Virginia at Richmond on March 30, 1977. The Ancarrows asserted claims against various members and former members of the Council of the City of Richmond, the City Manager, several of its department directors and, the City itself. The Complaint contains a 42 U.S.C. §1983 claim, a claim of a taking without just compensation, an admiralty claim, a claim based on federal common law and various pendent claims. By order reflecting agreement of counsel, the District Court dismissed with prejudice the 42 U.S.C. §1983 claim against all but the individual defendants in that capacity and dismissed the remaining claims against all but the City in its corporate capacity. Subsequently, the 42 U.S.C. §1983 claim was dismissed with prejudice as against all of the individual defendants.[1]

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[1]Pursuant to Rule 21 of the Rules of this Court, the City has requested the Clerk of the U.S. District Court for the Eastern District of Virginia, at Richmond, to certify and transmit to this Court the Complaint, the Orders of the District Court dismissing the Complaint against various parties defendant as well as a memorandum opinion relevant to several of those Orders and a transcript of proceedings in the District Court on November 30, 1977.

Following discovery in the form of interrogatories and depositions, the City moved the District Court to dismiss the remaining claims for lack of jurisdiction and for judgment on the pleadings. The relevant issues were briefed by counsel and the District Court subsequently denied the City's motion by order of November 18, 1977. No opinion accompanied this order. Concurrently with this denial, the District Court advised counsel that it appeared that this case might be one in which abstention to determine an issue of state law is proper and requested memoranda in point.

On November 30, 1977, the District Court heard oral argument regarding the merits of abstention and, for the reasons stated from the bench, announced that it would abstain but retain jurisdiction pending determination of an issue of state law in the Virginia courts. An order to this effect followed on December 19, 1977, from which the Ancarrows took an interlocutory appeal of right to the U. S. Court of Appeals for the Fourth Circuit.

Subsequent to the filing of a notice of appeal by the Ancarrows, the City moved the District Court to amend its order of November 18, 1977, denying the City's motions, to include the language prescribed by 28 U.S.C. §1292(b). The District Court granted this motion and entered an order on February 13, 1978, to amend the order of November 18, 1977. Thereafter, the City petitioned the Court of Appeals to permit an interlocutory appeal of the District Court's order of November 18, 1977, as amended, and an appeal was granted the City on March 13, 1978.

These appeals were consolidated for briefing and argument and on June 5, 1979, the Court of Appeals announced a ruling in which it found that the Ancarrows' claims were not within either federal common law or admiralty jurisdiction and that no federal question is presented by this case. Consequently, the Court of Appeals found that abstention was unnecessary and that the District Court erred in denying the City's motion to dismiss the complaint for failure to state a federal claim on which relief may be granted. Thus, the Court of Appeals reversed the judgment of the District Court and remanded the case for dismissal of the complaint. Ancarrow v. City of Richmond, 600 F.2d 443 (4th Cir. 1979). The Court of Appeals denied rehearing on July 16, 1979.

Statement of Facts

During the years 1961 and 1962, Newton H. and Josephine Ancarrow purchased adjacent parcels of land, one of which is bounded by the James River. The land was then leased to Ancarrow Marine, Inc., a boat building firm owned by the Ancarrows. Buildings suitable for the construction of boats were erected on the tract and Ancarrow Marine commenced operations at that location. In 1965, Ancarrow Marina placed in service an elaborate concrete structure capable of launching and retrieving large pleasure craft in the James River. From its inception Ancarrow Marina, Inc. was insolvent and it ceased operations in 1969. Garrett v. Ancarrow Marine, Inc., 211 Va. 755, 180 S.E.2d 668 (1971). Prior and subsequent to the demise of Ancarrow

Marine, Inc., the public was permitted to launch boats at the Ancarrow tract. The buildings formerly used by Ancarrow Marine were leased by other firms from time to time, but eventually were extensively damaged by flooding and fell vacant.

In 1975, the City of Richmond instituted condemnation proceedings in the Circuit Court of the City of Richmond to acquire title to the Ancarrow tract in fee simple for the purpose of expansion and improvement of the adjacent Richmond sewage treatment plant. The record of that proceeding, on which the City relied in part for the purpose of its motions, demonstrate that during the trial of the condemnation proceeding, the Ancarrows' evidence included reference to pollution in the James River. The trial court refused to permit such reference except insofar as the condition of the river had bearing on just compensation for the land condemned by the City. At one point in that proceeding, counsel for the Ancarrows complained that the rulings of the trial court in this regard were denying just compensation. In response the trial court offered a mistrial, but this was declined. The Ancarrows were awarded $130,000 as compensation for their land and improvements and subsequently they filed exceptions to the award, claiming among other things, that the award was inadequate. The Ancarrows' exceptions were overruled and the City took fee simple title to the tract on April 5, 1976. No appeal was taken from this state court proceeding by the Ancarrows. The Complaint, however, makes reference to the condemnation of their land and

improvements by the City and states that the state court's award was "grossly inadequate" to compensate the Ancarrows "for the value their property would have had but for the activities of the Defendants in allowing the pollution problems of the James River to continue unabated." Complaint, para.22, page 5.

Discovery had during the pendency of the action revealed that the Ancarrows envisioned a marina on their land replete with hotel, restaurant and docks and slips which went unbuilt, it is alleged, because of the polluted condition of the river which, over the years that they owned the adjacent tract, did not improve, they claim, sufficiently to attract the boating public for their purpose.

ARGUMENT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE VIRGINIA LAW.

The Ancarrows' Complaint presents eight claims for relief.[2] The first four

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[2]These claims may be summarized as follows:

First Claim:	42 U.S.C. §1983.
Second Claim:	taking without just compensation, 5th and 14th Amendments.
Third Claim:	admiralty.
Fourth Claim:	federal common law.
Fifth Claim:	taking without just compensation, Va. Const., Art. I, §11.
Sixth Claim:	nuisance.
Seventh Claim:	negligence.
Eighth Claim:	trespass.

claims for relief presented by the Complaint are asserted as federal claims or claims to which the District Court's original jurisdiction attaches according to the terms of the relevant statutes of the United States. The balance of the Ancarrows' claims are "State claims" for which it is alleged that the District Court has pendent jurisdiction.

In support of these claims, the Complaint presents a common set of facts enumerated as paragraphs 9-22. However, not all of the allegations of paragraphs 9-22 of the Complaint can be read against the City.

As the Preliminary Statement recites, the District Court dismissed the Ancarrows' First or 42 U.S.C. §1983, Claim against all parties defendant. In a memorandum opinion to which the District Court made reference in Orders of September 9 and 15, 1977, dismissing the individual defendants, the District Court stated that:

> "Without objectively adequate grounds plaintiffs surmised that members of the Richmond City Council voted to take plaintiffs' real estate by eminent domain out of maliciousness and ill will toward the plaintiffs. Having instituted suit against the councilmen in their individual capacities, plaintiffs proceeded to conduct discovery and were unable to obtain a scintilla of evidence in support of their surmise." Memorandum Opn., page 2.

The Court's ruling was a judgment on the merits of the plaintiffs' claim. The averments of the Complaint common to all of the plaintiffs' claims and which formed the basis for the plaintiffs' 42 U.S.C. §1983 claim are contained in paragraphs 19 through 21 of the Complaint and restated in paragraphs 24 and 25 which relate specifically to the First, or §1983 Claim.

Thus, the allegations of paragraphs 19-21 with the exception of the fact of the condemnation alleged in paragraph 20, are conclusory and so baseless that they now can be considered only as frivolous matters alleged simply to invoke the District Court's jurisdiction. Cf. Preston v. Purtell, 410 F.2d 234 (4th Cir. 1969).

In essence, the averments common to all of the Ancarrows' claims exclusive of the matters contained in paragraphs 19-21 of the Complaint assert that during the years 1961 and 1962, the Ancarrows purchased a riparian tract upon which they intended to construct and build a boat building and repair facility as well as a marina. It is averred that prior and subsequent to the purchase of this tract the Ancarrows received numerous representations from unnamed officials of the City of Richmond "that the pollution problems of the James River would soon be abated." The Ancarrows allege that notwithstanding these representations the City has "not taken reasonable steps toward solving the pollution problems of the James River," but, nevertheless, based on these representations, the plaintiffs have expended large sums of money and

their own labor to construct facilities on their land toward their goal of operating boat building, repair facilities and a marina. The severe pollution problems of the James River prevented the Ancarrows, they allege, from operating these facilities economically and significantly reduced the value of their property. The plaintiffs attribute the condition of the James River primarily to the conduct of the City in the operation of its sewage system. The City has condemned the Ancarrows' land and the Ancarrows allege that the amount awarded was grossly inadequate to compensate them for the value their property would have had but for the fact that the City allowed the pollution problems of the James River to continue unabated.

For the purpose of passing on the merits of the City's motions, the Court of Appeals reviewed the Ancarrows' claims of a "taking" within the meaning of the Fourteenth Amendment, admiralty, and federal common law. The Ancarrows here seek review of the lower court's judgment regarding their "taking" and federal common law claims.

It should be noted and cannot be underemphasized that the case urged upon this Court for review is presented as a matter of "...discharges of raw sewage by the City [which] created a situation in which the James River in the immediate vicinity of...[the Ancarrows'] property was so fouled with fecal matter...and other debris that the use of the river, particularly for recreational purposes, was virtually eliminated." (Emphasis added.) Petition for Writ of Certiorari at 11. Thus, the phrase "immediate vicinity" as the Ancarrows

have emphasized it, takes on a broader meaning in the context of the quotation than might otherwise appear upon a casual reading.

In contrast, the Ancarrows continue in their Petition to state that "[i]n addition they alleged that these discharges...floated onto their land even above the ordinary high water mark, and caused a substantial interference with the use of their land." Ibid at 11, 12. The Ancarrows thus articulate two distinct effects of pollution which they attribute to the City, one bearing on the river, the other bearing on the land. However, the case law of Virginia on which the Ancarrows rely is employed by them for their purpose here only in the context of direct impact of pollution on their land between and above the low and high water marks. They therefore place emphasis on the long settled rule in Virginia stated in Darling v. City of Newport News, 123 Va. 14, 96 S.E. 307 (1918) as follows:

> "There is a marked and well defined distinction between the pollution of a small non-navigable stream, and the pollution of large tidal navigable bodies of salt water, for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and

> controlled by the State, for the use and benefit of all the public, subject only to navigation. It is for the State to say what uses shall be made thereof and by whom, subject always to the right of the public, and for the State, through the legislative branch of the government, to say how much pollution it will permit to be emptied into and upon its water, so long as the owners of the land between low water and high water mark are not injured." (Emphasis added.) 123 Va. at 16-17, 96 S.E. at 307.

It should be noted that this concluding caveat is not couched in terms of owners of riparian rights, but, rather, in terms of owners of land. Thus, the caveat runs to the protection of the owner of land from which riparian rights have been severed.

Nowhere do the Ancarrows allege that pollution deposited on their land prevented them from realizing enhanced value if the land were put to use as a marina. On the contrary, the essence of their claim is that the City, by failing to cleanse the river to such degree as may be suitable for public use of a marina, a potential value of land was not realized. In this context, direct injury to the land above the low water mark is only of collateral interest, since if it were by some means abated it would not necessarily follow

that the river itself would be any more suitable for the Ancarrows' purposes.

Thus, the Court of Appeals found that:

> "The gravamen of plaintiffs' due process claim is that they have a riparian right to use public waters in a navigable stream, which was taken in the constitutional sense by the city's continuing pollution of the James River. Had the river been unpolluted at the time plaintiffs' property was condemned, the value of their marina improvements would have been enhanced and their condemnation recovery correspondingly greater.
>
> * * *
>
> "...[P]laintiffs claim that they have a state-recognized riparian right to demand water of a particular purity, both for their own use and for the use of customers at their marina. They also claim a right which may best be termed a right of beneficial location to have the city put the public water of the James River to a use which is more favorable to their commercial marina development than the present use for sewage disposal." 600 F.2d at 446.

The nature and extent of the rights of riparian owners are to be determined by

the law of that state wherein the waters in which rights are claimed lie. Fox River Paper Co. v. Railroad Commission of Wisconsin, 274 U.S. 651, 71 L.Ed. 1279 (1927); Kaukauna Water Power Co. v. Green Bay and Miss. Canal Co., 142 U.S. 254, 35 L.Ed. 1004 (1891). Consequently, after hearing argument on November 30, 1977, the District Court abstained to permit determination of the scope of the Ancarrows' riparian rights in the context of their claim in the courts of Virginia. See Transcript of proceedings in the District Court of November 30, 1977. The Court of Appeals on the other hand found that abstention was unnecessary in view of its prior, exhaustive examination of Virginia case law in point in DuPont Rayon Co. v. Richmond Industries, 85 F.2d 981 (4th Cir. 1936).

Thus, in DuPont, where the plaintiff sought to enjoin the disposal of dyestuffs in the James River on the ground that as a riparian owner it used river water in its industrial process and the presence of dyestuffs therein would have the effect of greatly depreciating the value of its product, the Court of Appeals found that:

> "...[W]hile the riparian owner is entitled under the law of Virginia to make a reasonable use of the water as it flows past or laves his land..., this right on tidal, navigable waters is subject to the jus publicum, or right of the public, to use the waters for sewerage purposes." (Citation of Virginia authorities omitted) 85 F.2d at 982.

In reliance on its prior decision, the Court of Appeals said of the Ancarrows' claim that the same "...reasoning applies with equal force to plaintiffs, who claim a superior right to use water of a particular purity for their marina development." 600 F.2d at 446.

Moreover, the Court of Appeals examined the State Water Control Law[3] adopted by Virginia subsequent to DuPont and found it to be "...merely one portion of a statutory scheme to regulate the quality of the Commonwealth's waters." See Darling v. City of Newport News, ibid. Thus, "[t]he statute does not by its terms purport to grant a new riparian right to private property owners which is superior to a city's state-regulated right to lawfully pollute public waters." 600 F.2d at 447. Moreover, as the Court of Appeals noted in DuPont, disposal of sewerage in tidal water is an incident of the jus publicum, which is itself an incident of the sovereignty of Virginia which may not be relinquished or destroyed except to the extent that the State or Federal Constitution may plainly authorize the legislature of Virginia to do so. Commonwealth v. City of Newport News, 158 Va. 521, 547, 164 S.E. 689, 697 (1932).

As was said in DuPont and is equally true in this case, "...it must be borne in mind here that the question involved relates merely to the right of the riparian owner to use the water and prevent

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[3]Va. Code §62.1-44.2, et seq. [1973 Repl. Vol.]

pollution thereof, not to fouling of the land thereof." 85 F.2d at 983. Here, as heretofore noted, the Ancarrows predicate their claim on value their land would have had but for the pollution of the river and not fouling of the land itself. In truth, the Ancarrows may be said to claim a proprietary interest in the jus publicum itself. Consequently, it is extravagant for the Ancarrows to claim, as they do at page 15 of their Petition, that this case presents an "...opportunity ...to clarify the law relating to the degree to which states may immunize governmental activities from the requirements of the Eminent Domain Clause by declaring that the interest interfered with is not a 'property' right."

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISIONS OF THIS COURT.

The Ancarrows have also relied on the Virginia authorities cited at page 11 of their Petition for the proposition that the "superior right" of municipalities to discharge sewage does not extend to creating a nuisance. Thus they claim at page 18 of their Petition that "[t]he manner in which the City's sewage discharge affected the Ancarrows makes their injury different not only in degree but also in kind from that suffered by the general public." (Emphasis added.) However, the Court of Appeals found that "...plaintiffs have suffered a consequential injury which, though greater in degree than that of the rest of the public, is the same in kind," citing

Reichelderfer v. Quinn, 287 U.S. 315, 77 L.Ed. 331 (1932), 600 F.2d at 447. It is manifest that the Ancarrows have suffered no injury different in kind from the general public simply because they sought to put their land to use as a marina and the Court of Appeals was clearly correct.

It is noteworthy that the Ancarrows make no claim that the James River was clean enough for their purposes and the City subsequently fouled it. Rather, the Complaint is fairly read to mean that the Ancarrows were aware of the river's condition prior to purchasing their land and now claim detrimental reliance on "numerous representations from officials of the City of Richmond." Complaint, paras. 12-15, page 4: Ancarrow v. City, ibid. ftn. 1 and 2, 600 F.2d at 445, 446. Thus, at best, the Ancarrows raise issues of state law as the Court of Appeals found. And, consequently, when the Complaint is viewed in this context, the allegation of a "taking" within the meaning of the relevant constitutional provisions can only be viewed as one of mere form. As this Court has observed, a federal question must exist "not in mere form, but in substance, and not in mere assertion but in essence and effect." Cuyohoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 389, 397, 64 L.Ed. 626, 630 (1920). Thus, the Ancarrows' reliance on those authorities set forth in part 2 of their Petition is misplaced and, as the Court of Appeals found, there is no basis for jurisdiction grounded on an issue of federal common law.

CONCLUSION

As the Court of Appeals found, this case presents issues of state law at best. There is no issue here worthy of this Court's consideration. Consequently, writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 true copies of the foregoing Brief in Opposition To A Writ of Certiorari were mailed, first class postage prepaid, this 16th day of November, 1979, to Patrick M. McSweeney, Esq., McSweeney & Stutts, 121 Shockoe Slip, Richmond, Virginia 23219, counsel for Petitioners.

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